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Liberalization of trade in services and human rights

Report of the High Commissioner*

Executive summary

* The present report exceeds the page limits set by the General Assembly. Therefore, the executive summary only is being translated into all the official United Nations languages. The annex is being circulated in the original language only.

The report was submitted after the date set by the General Assembly in order to allow an appropriate length of time to circulate the document for discussion and incorporate any comments received.

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The present report is submitted in response to Sub-Commission resolution 2001/4 which requested the High Commissioner to submit a report on the human rights implications of the liberalization of trade in services, particularly in the framework of the General Agreement on Trade in Services (GATS).

The report is the third in a series of reports of the High Commissioner concerning human rights and trade, the others being a report on the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (E/CN.4/Sub.2/2001/13), and a report on the WTO Agreement on Agriculture (E/CN.4/2002/54). The present report builds on the analyses in these previous reports. It begins by setting out the relationship between human rights and trade, drawing on human rights principles and standards as well as the previous reports of the High Commissioner. In particular, it notes that all WTO members have undertaken obligations to promote and protect human rights, and notes that a human rights approach to trade:

(a) Sets the promotion and protection of human rights among the objectives of trade liberalization;

(b) Examines the effects of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;

(c) Emphasizes the role of the State in the process of liberalization - not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer for the implementation of human rights;

(d) Seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;

(e) Requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;

(f) Promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.

The report introduces trade in services. International trade in services can occur over a whole range of services - from transport, telecommunications and tourism services, to health, education and water services and more. International trade in services is growing and its importance to trade overall is increasing relative to trade in goods. International trade in services can occur in four principle ways, namely:

(a) *Cross-border supply* - the supply of a service across a border where both the service provider and service consumer do not leave their own countries;

(b) *Consumption abroad* - the supply of a service where the consumer physically travels from one country to another to obtain a service;

(c) *Commercial presence* - the supply of a service where the supplier offers a service in another country through an agency, branch, subsidiary, joint venture, etc.;

(d) *Presence of natural persons* - the supply of a service where someone temporarily enters another country in order to provide a service.

The report then introduces the General Agreement on Trade in Services (GATS). While many policies, agreements and laws drive and shape the liberalization of trade in services, GATS is significant as the first multilateral agreement to set a legal framework for the liberalization process. GATS includes general obligations that apply to all services that come within the scope of GATS for all WTO members. The Agreement also allows States to commit voluntarily specific service sectors to liberalization. Each country has a schedule in which these country-specific commitments are made. Importantly, GATS includes the trade principle of "non-discrimination" known as "most favoured nation", as well as "national treatment". After setting an outline for GATS, the report examines the obligations of States to promote and protect the human rights most directly affected by the liberalization of trade in services, specifically the right to health (including the right to drinking water), the right to education and the right to development.

The liberalization of trade in services can impact on these rights in various ways, depending on a range of issues, not least the type of services being supplied, the mode of service delivery, the development level of the country and its internal infrastructure, the regulatory environment and the level of existing services prior to liberalization. One issue of particular relevance is the effect of increased foreign direct investment (FDI), in particular from the private sector, and its effect on the enjoyment of human rights. While FDI can upgrade national infrastructures, introduce new technology and provide employment opportunities, FDI can also have undesired effects where there is insufficient regulation to protect human rights. In particular, as with any national privatization scenario, increased foreign private investment can lead to:

(a) The establishment of a two-tiered service supply with a corporate segment focused on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick;

(b) Brain drain, with better trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures;

(c) An overemphasis on commercial objectives at the expense of social objectives which might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates;

(d) An increasingly large and powerful private sector that can threaten the role of the Government as the primary duty bearer for human rights by subverting regulatory systems through political pressure or the co-opting of regulators.

The report notes that, to the extent that these phenomena can be linked to the liberalization of trade in services, regulators need to be conscious of ensuring that liberalization policies take into account State responsibilities to respect, protect and fulfil human rights. Human rights law does not place obligations on States to be the sole provider of essential services; however, States must guarantee the availability, accessibility, acceptability and adaptability of essential services including their supply, especially to the poor, vulnerable and marginalized.

Looking specifically at GATS itself, the report notes that, given the opportunities and challenges posed by the liberalization of trade in services to the enjoyment of human rights, it is important to understand the interaction between the rules and disciplines in GATS and the norms and standards of human rights law. In particular:

(a) GATS is broad in scope. The High Commissioner encourages interpretations of the scope of GATS to ensure that under GATS obligations do not constrain Governments in taking action to promote and protect human rights;

(b) Many government regulations are measures that can come within the scope of GATS. While GATS acknowledges Governments' right to regulate in its preamble, the question remains as to the extent to which GATS can affect government regulations that might have an impact on trade - including government regulations relevant to the promotion and protection of human rights. Consequently, judgements on or "tests" of the trade-restrictiveness of government domestic regulation under GATS should take into account States' obligations under human rights law;

(c) Both GATS and human rights law include the principle of non-discrimination; however, there are distinctions in the application of the principle. The High Commissioner highlights the need to ensure that the application of trade law takes into account the human rights principle of non-discrimination, including by safeguarding the need to use mechanisms such as "cross-subsidization" to ensure that the poor, vulnerable and marginalized do not suffer discrimination in accessing services in liberalized markets;

(d) GATS includes general exceptions to protect public morals as well as human, animal and plant life and the protection of certain aspects of individual privacy. These could be seen as being linked to the need to promote and protect human rights in the liberalization process;

(e) GATS seeks the liberalization of trade in services through the progressive opening up of States' services markets. However, there is at times a need for States to have some flexibility to modify and withdraw country-specific commitments to liberalize trade in services, taking into account the need for States to meet their human rights obligations;

(f) Country-specific commitments to liberalize service sectors under GATS could have both positive and negative effects on the enjoyment of human rights. Consequently, WTO members should be encouraged to undertake assessments of the impact of the implementation of

GATS on the enjoyment of human rights as part of the ongoing negotiations concerning GATS. Assessments should concern both past experience and potential effects of future liberalization commitments;

(g) Developed countries, in accordance with their responsibilities to cooperate internationally to promote human rights, should share both financial and technical expertise to support developing countries to undertake assessments.

Finally, the High Commissioner identifies a list of areas requiring further action to promote human rights approaches to the liberalization of trade in services, including the following:

(a) *Ensuring equal access for basic services* - the High Commissioner encourages States to take action to ensure universal supply of essential services, including through the use of affirmative action to ensure provision of services to the poor, isolated and marginalized, taking into account national circumstances and capacities;

(b) *Ensuring Governments' right and duty to regulate* - the High Commissioner encourages interpretations of GATS provisions that acknowledge the need for countries to retain the flexibility to use development tools, such as "cross-subsidization" or the regulation of corporate governance, in response to national development needs;

(c) *Encouraging interpretations of GATS that are compatible with human rights* - the High Commissioner reminds WTO members of their concurrent obligations under human rights law and encourages the development of rules or "tests" that acknowledge and protect States' duties concerning human rights when determining or assessing whether a measure is trade-restrictive;

(d) *Undertaking human rights assessments of trade policies* - the High Commissioner highlights the voluntary nature of commitments to liberalize trade in services and stresses the need to make commitments on the basis of sound empirical evidence;

(e) *Providing international cooperation and assistance* - the High Commissioner reminds developed countries of the commitment to provide 0.7 per cent of GDP as official development assistance. Further, the High Commissioner reminds States of their responsibility to negotiate in ways that enable poorer countries to maintain the maximum flexibility to develop policies to meet commitments to the progressive realization of human rights;

(f) *Increasing dialogue on human rights and trade* - the High Commissioner encourages greater consultation between delegates to WTO and delegates representing the same country as members or observers in the Commission on Human Rights on the links between human rights and trade and on particular ways to ensure coherence in policy and lawmaking;

(g) *Future work* - the High Commissioner recommends that the Sub-Commission consider requesting a report on "human rights, trade and investment".

Annex

LIBERALIZATION OF TRADE IN SERVICES AND HUMAN RIGHTS: REPORT OF THE HIGH COMMISSIONER

CONTENTS

	Paragraphs	Page
Introduction	1 - 3	7
I. HUMAN RIGHTS AND TRADE	4 - 14	7
II. HUMAN RIGHTS AND TRADE IN SERVICES	15 - 37	12
A. Introduction to trade in services	15 - 18	12
B. The General Agreement on Trade in Services	19 - 27	14
C. Relevant norms and standards of human rights law	28 - 37	16
III. THE IMPACT OF TRADE IN SERVICES ON HUMAN RIGHTS	38 - 67	19
A. Issues arising from the liberalization of trade in services	38 - 50	19
B. Issues arising from GATS	51 - 67	24
IV. CONCLUSIONS AND RECOMMENDATIONS	68 - 75	29

Introduction

1. In its resolution 2001/4, the Sub-Commission requested the High Commissioner to submit a report on the human rights implications of the liberalization of trade in services, particularly in the framework of the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO), to its fifty-fourth session. The High Commissioner submits the present report in response to the resolution.

2. The report is the third in a series of reports of the High Commissioner concerning human rights and trade. At the fifty-third session of the Sub-Commission, the High Commissioner submitted the first report on trade and human rights (E/CN.4/Sub.2/2001/13) which considered the human rights implications of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). That report examined the TRIPS Agreement in light of the obligations on States under the International Covenant on Economic, Social and Cultural Rights, and reviewed specific ways in which the Agreement could be interpreted and implemented that are consistent with the right to access essential medicines. The High Commissioner submitted the second report on trade and human rights to the fifty-eighth session of the Commission on Human Rights (E/CN.4/2002/54) which focused on the WTO Agreement on Agriculture. That report examined ways in which the ongoing reform process concerning agricultural trade could be directed towards protecting the right to food and the right to development of people in developing countries, in particular by introducing enforceable special and differential assistance for developing countries and by achieving real market access for agricultural products of developing countries in the countries of the Organization for Economic Cooperation and Development (OECD).

3. The present report will build on the analyses in these previous reports, this time focusing on the liberalization of trade in services and its relationship with the enjoyment of human rights, in particular the right to health, the right to education and the right to development. The report begins with a general outline of the relationship between human rights and trade drawing on human rights principles and standards as well as the previous reports of the High Commissioner. The report then introduces trade in services and the WTO General Agreement on Trade in Services (GATS) and sets out the norms and standards of human rights most relevant to the liberalization of trade in services. Part II begins with the third section which lists the issues arising, first in the liberalization of trade in services generally, and then specifically in the framework of the GATS. The final section sets out the conclusions and recommendations of the High Commissioner, including her recommendations for further work. As with the previous reports, the present report has been drafted in consultation with other international organizations, specifically WTO and the World Health Organization (WHO). Consultations were also held with human rights experts, academics and civil society.

I. HUMAN RIGHTS AND TRADE

4. International trade law and human rights law have grown up more or less in isolation from each other. Yet as trade rules increasingly broaden their scope into areas that affect the enjoyment of human rights, commentators are recognizing the links between the two, seeking to understand how human rights and trade interact, in an attempt to provide greater coherence to international law and policy-making and a more balanced international and social order. The

logic behind understanding these links is compelling. While WTO Agreements provide a legal framework for the economic aspects of the liberalization of trade, they focus on commercial objectives. The norms and standards of human rights provide the means of providing a legal framework for the social dimensions of trade liberalization.

5. The legal basis for adopting human rights approaches to trade liberalization is clear. All WTO members have undertaken obligations under human rights law. All 144 members of the WTO have ratified at least one human rights instrument, 112 have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and all but one have ratified the Convention on the Rights of the Child. Further, those areas of human rights law recognized as customary international law take on universal application, which means that trade rules should be interpreted as consistent with those norms and standards whatever the treaty commitments of States in trade matters. In other words, whatever the human rights treaty obligations undertaken by particular States, WTO members have concurrent human rights obligations under international law and should therefore promote and protect human rights during the negotiation and implementation of international rules on trade liberalization. The rest of this section attempts to identify the main elements of human rights approaches to trade liberalization, with particular reference to interpretative material concerning the ICESCR as well as the previous reports of the High Commissioner relevant to human rights and trade (E/CN.4/Sub.2/2001/13, E/CN.4/2002/54).

6. A human rights approach sets as entitlements the basic needs necessary to lead a life in dignity and ensures their protection in the processes of economic liberalization. Article 1 of the Universal Declaration of Human Rights states that "(a)ll human beings are born free and equal in dignity and rights" the protection of which, through the rule of law, is necessary if recourse to rebellion is to be avoided.[1] The Universal Declaration establishes the civil, cultural, economic, political and social needs necessary to human dignity and transforms these needs into legal entitlements or rights to be protected, including, by extension, in the processes of trade liberalization. The legal imperative of respecting human rights means that States are accountable for ensuring that these entitlements cannot be reduced to mere privileges or luxuries or left subject to the whim of markets. The content of these basic entitlements have since been elaborated at the national, regional and international level. Of particular relevance to international trade are the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights and the general comments of the Committee on Economic, Social and Cultural Rights (CESCR)[2] on health, education, food and housing, all of which have added considerable clarity to these entitlements and the obligations on States to protect them.

7. The fundamental nature of these entitlements as rights requires an approach that sets the promotion and protection of human rights as objectives of trade liberalization, not as exceptions. In her report on the TRIPS Agreement (E/CN.4/Sub.2/2001/13), the High Commissioner noted that the need to promote public health, nutrition, environment and development was acknowledged in that agreement, but only as an exception to the rules. In contrast, she noted that a human rights approach would place the promotion and protection of human rights at the heart of the objectives of intellectual property protection, rather than only as permitted exceptions that are subordinated to the other provisions in the TRIPS Agreement. More recently, the CESCR has stated that "Ultimately, the end which intellectual property protection should serve is the

objective of human well-being to which the international human rights instruments give legal expression" (E/C.12/2001/15, para. 4). Human rights approaches to trade generalize this position to apply to the negotiation, implementation and monitoring of all agreements and policies that drive trade liberalization - whether in goods, services or intellectual property. In this way, a human rights approach examines trade law and policy comprehensively, focusing not only on economic growth, markets or economic development but also on health systems, education, water supply, food security, labour, political processes and so on.

8. In setting comprehensive objectives for trade liberalization that go beyond commercial objectives, a human rights approach examines the effect of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals. The basis for this approach is derived from the notion that the human person is the central subject of human development,[3] and that everyone can claim and enjoy rights without discrimination. Non-discrimination, together with equality and equal protection before the law, is a fundamental principle relating to the protection of human rights. The Human Rights Committee has stated its belief that "discrimination" as used in the International Covenant on Civil and Political Rights should be understood "to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[4] In seeking equality in the exercise and enjoyment of rights, the human rights principle of non-discrimination does not, however, require equal treatment to everyone in all cases. Affirmative action for the poor, marginalized and vulnerable might be appropriate at times. While non-discrimination is also a principle of trade law, there is nonetheless a distinction in the application of the principle. While trade law seeks non-discrimination in the application of laws between nationals and non-nationals and between non-nationals of other WTO member States, the human rights principle of non-discrimination is designed to achieve justice and equality between all individuals, whatever their status. In the context of agricultural trade, the High Commissioner observed that, while trade law envisages equal treatment for national and non-nationals - whether poor farmers or large agrobusinesses - the principle of non-discrimination under human rights law will consider the impact of trade rules, not only on the need to minimize trade distortions, but also on individuals, in particular vulnerable individuals and groups, and set rules accordingly (E/CN.4/2002/54, paras. 42 and 43).

9. Taking into account the need to focus on individuals, in particular vulnerable individuals and groups, a human rights approach to trade liberalization promotes the need to examine the right form and pace of liberalization depending on national circumstances. The Declaration on the Right to Development declares that "(s)tates have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".[5] The High Commissioner has recognized that, while all international treaties can take away a degree of autonomy from States, States have responsibilities to ensure that the loss of autonomy does not disproportionately reduce their capacity to set and implement national development policy (E/CN.4/Sub.2/2001/13, para. 24; E/CN.4/2002/54, para. 41). States therefore have a responsibility to consider how commitments undertaken internationally impact

on the right to development in that country. Indeed, the High Commissioner has concluded that the opening of markets in a manner that is conducive to the protection of human rights depends on the particular circumstances of the country in question and encourages the negotiation and interpretation of trade rules that acknowledges this (E/CN.4/2002/54, para. 42). Developing countries should therefore be careful to ensure the form and pace of liberalization appropriate for national circumstances and not bargain away the possibility of using development tools that wealthy countries have previously used. At the same time, developed countries have responsibilities to take into account the particular obligations of developing countries to meet their responsibilities to protect human rights and ensure operational special and differential treatment for developing countries accordingly.

10. A human rights approach emphasizes the role of the State in the process of liberalization. While individuals and vulnerable groups are the beneficiaries of human rights, the State holds the primary responsibility for protecting those rights. A human rights approach to trade liberalization therefore emphasizes the role of the State, not only as negotiator of trade rules and setter of trade policy, but also as the duty bearer for human rights. Under human rights law, States have obligations to respect, protect and fulfil human rights. In the field of economic, social and cultural rights:[6]

(a) The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights;

(b) The obligation to protect requires States to prevent violations of such rights by third parties;

(c) The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights note the trend in all regions of the world to reduce the role of the State, relying on market forces to resolve problems concerning human welfare, often as a result of efforts to attract investments from multinational enterprises or to respond to the conditions generated by international and national financial markets and institutions. In this respect, the obligations on States to respect, protect and fulfil human rights include the responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.[7]

11. A human rights approach requires progressive trade liberalization to be consistent with the progressive realization of human rights.[8] While there are elements in all human rights that should be implemented immediately - such as respect for the principle of non-discrimination - there are other elements that require time, resources and planning to realize, depending on the particular conditions existing in the country in question. Nonetheless, States have undertaken to move as expeditiously as possible towards the progressive realization of those elements.[9] At the same time, trade rules envisage a process of legal and policy development towards achieving progressively higher levels of liberalization. While these two processes need not move in opposite or conflicting directions, the adoption of any deliberately retrogressive measure in the liberalization process that reduces the extent to which any human right is protected constitutes a

violation of human rights.[10] A human rights approach therefore seeks the means of ensuring that these two processes - progressive realization of human rights and progressive trade liberalization - can be implemented simultaneously and coherently.

12. A human rights approach requires a constant examination of trade law and policy as it affects the enjoyment of human rights. Assessing the potential and real impact of trade policy and law on the enjoyment of human rights is perhaps the principal means of avoiding the implementation of any retrogressive measure that reduces the enjoyment of human rights. Human rights assessments of liberalization provide both a set of targets and standards for assessments as well as a methodology for undertaking assessments. Thus, human rights assessments gauge the implementation of trade policies on a set of outcomes according to the subject matter of human rights - health care, education, food security and so on. Further, human rights assessments introduce a methodology for assessments that promotes popular participation and consultation of the people affected by liberalization - the poor, people dependent on public services, rural as well as urban dwellers, small business people and so on. Further, such a consultative process would seek the opinion, not only of trade and industry ministries but also ministries dealing with social issues such as health and education. Further, a human rights approach to assessments emphasizes transparency and accountability so that the outcomes of assessments and negotiation processes in trade forums are open to public scrutiny. Consequently, essential to a human rights approach to trade is a cautious approach to the setting of trade policy and rules, based on sound evidence that any particular strategy will promote the enjoyment of human rights, not only lead to increased investment or economic growth.

13. A human rights approach promotes international cooperation for the realization of all human rights and fundamental freedoms. International cooperation has two important elements. First, international cooperation must be directed towards the establishment of a social and international order in which all human rights can be fully realized.[11] The Secretary-General has stated that "such an international and social order is one that promotes the inherent dignity of the human person, respects the right of people to self-determination and seeks social progress through participatory development and by promoting equality and non-discrimination in a peaceful, interdependent and accountable world" (A/55/342, para. 7). As noted recently by the High Commissioner, "achieving fair and equitable trade liberalization by adopting human rights approaches to WTO rules will be an important step in establishing a just international and social order and a failure to do so could perpetuate or even exacerbate existing inequalities" (E/CN.4/2002/54, para. 9).

14. Second, States have undertaken to take steps, both individually and through international assistance and cooperation, to promote human rights.[12] The High Commissioner has already identified some of the areas that are appropriate for international cooperation in the field of trade such as improving market access opportunities for developing countries, operationalizing special and differential treatment provisions for developing countries, introducing special and differential treatment for developing countries that is targeted at vulnerable people and groups, increasing finance for development to allow policies that are targeted to allow developing countries to make the most of the flexibilities available to them under trade agreements, encouraging developed countries to establish clear incentives to promote technology transfer, and assisting developing countries, in particular countries acceding to the WTO, in trade negotiations (E/CN.4/Sub.2/2001/13, para. 67; E/CN.4/2002/54, paras. 47-53). Importantly, the

High Commissioner stresses that international assistance and cooperation involves States working together. In this sense, human rights should not be used as disguised barriers to trade. International cooperation also requires States to act consistently with their human rights obligations at the international level. In particular, the Maastricht Guidelines recognize that a failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations constitutes a violation of human rights.[13]

II. HUMAN RIGHTS AND TRADE IN SERVICES

A. Introduction to trade in services

15. Services can be offered in relation to a vast range of economic activities of importance to both economic and social issues, such as health care, education, water supply, telecommunications, tourism, transport, construction, banking and finance and many other economic and social spheres. Importantly, services act as an essential input into the production of goods and even other services and as a result can facilitate growth and development. The OECD notes, for example, that promoting trade and investment in services in key infrastructural service sectors such as telecommunications, finance, transport and energy as well as business and legal services can remove impediments to economic growth in developing countries as well as maximize the benefits from the internationalization of services markets.[14] Not only can services liberalization affect economic growth and trade, it can also have an impact on the provision of essential entitlements accepted as human rights such as health care, education and water. In relation to health care, for example, a report to the WHO Commission on Macroeconomics estimated the commercial value of the health-care sector at around $3 trillion in 2001, which it expects to rise to $4 trillion by 2005, and observed that it is one of the most rapidly growing service sectors and therefore one that could have a significant impact on the enjoyment of human rights.[15]

16. International trade in services can occur in a number of ways which can best be described by reference to the classification in GATS.[16] GATS breaks down trade in services in four different modes as follows:

(a) *Cross-border supply* - cross-border supply (or mode 1) refers to the supply of a service across a border where both the service provider and consumer do not leave their respective countries. An example of cross-border supply is the offering of telemedicine services - curative medicine via the Internet - in Canada, for consumption by a patient in Venezuela;

(b) *Consumption abroad* - consumption abroad (or mode 2) refers to the supply of a service where the consumer physically travels from one country to another to obtain a service. An example of consumption abroad is a Thai student travelling to the United States to undertake graduate studies in a United States university;

(c) *Commercial presence* - commercial presence (or mode 3) refers to a service supplier offering a service in another country through, for example, an agency, branch, subsidiary or joint venture. An example is a Singapore telecommunications corporation offering telephone services in a neighbouring country through a subsidiary;

(d) *Presence of natural persons* - the presence or movement of natural persons (or mode 4) refers to people temporarily entering another country in order to provide a service. An example would be a Filipino nurse offering nursing services in the United Kingdom for a limited period of time.

17. The international trade in services is growing. Between 1985 and 1999, annual growth for cross-border supply of services and consumption abroad (modes 1 and 2 above) was over 9 per cent per annum compared to 8.2 per cent for trade in goods although services account for no more than one fifth of total cross-border trade.[17] OECD countries dominate global trade and investment in services although developing countries are increasing their share of global services markets, in particular in areas such as tourism, labour mobility, software development services and transaction processing and, over the past 10 years, the gap between OECD and developing countries' share of services markets has been narrowing.[18] To illustrate the relative importance of services to country groupings in relation to gross domestic product (GDP), in 1998 services accounted for 65 per cent of GDP in high-income countries, 56 per cent in middle-income countries and 38 per cent in low-income countries. Between 1980 and 1998, the services share in world GDP rose by 5 per cent while the increase for low- and middle-income countries has been estimated at 9 per cent.[19] It should be noted, however, that these figures do not go so far as to indicate the amount of these services that were traded internationally.

18. The globalization and liberalization of trade in services has been driven by many factors. In particular, technological advances have allowed for the provision of better services at lower costs while also provoking more competition in areas that were once dominated by monopoly service suppliers. Similarly, improved and cheaper travel has increased the mobility of service suppliers and consumers. Given the catalyst role of services, the ongoing liberalization of trade in goods has also promoted growth in service supply. Government policies have also played a role in promoting globalization and liberalization. For example, changing approaches to domestic regulation and investment regimes, declining public expenditures and withdrawal of public participation in certain service areas have provided the conditions for service supply by increasingly large and powerful corporations. At the regional and international levels, agreements such as the North America Free Trade Agreement (NAFTA) or GATS have provided legal frameworks to promote progressive liberalization. Nonetheless, within this context, regulation of the supply of services is still necessary to promote development, or to ensure the provision of essential services such as health, education or water, and comprehensive regulation is often needed to ensure non-discriminatory and equitable service supply according to social needs rather than market demands.

B. The General Agreement on Trade in Services

19. GATS was negotiated in the context of the Uruguay Round of multilateral trade negotiations and is the first multilateral agreement governing all forms of international trade in services. It covers trade in all services, with the exception of much of the air transport sector, as well as those services supplied in the exercise of governmental authority[20] and seeks to establish a multilateral framework of principles and rules for trade in services with a view to the progressive liberalization and expansion of this trade.[21] The Council for Trade in Services oversees the operation of the Agreement and generally meets four times a year.[22]

20. GATS - as with all WTO Agreements - includes the principle of non-discrimination in two forms. First, the principle is manifested as what is known as "most favoured nation treatment" which requires each WTO member to accord to services and service suppliers of other WTO members treatment no less favourable than the treatment it accords to the services and service suppliers of any other country - in other words, non-discrimination between foreign services and service suppliers.[23] Second, the principle is manifested as "national treatment" which requires each WTO member to accord services and service suppliers of any other WTO member treatment no less favourable than the treatment it gives to its own like services and service suppliers - in other words, non-discrimination between national and non-national services and service suppliers.[24] The relationship between non-discrimination under trade law and under human rights law will be discussed in greater detail below.

21. Two parts of GATS are particularly relevant to human rights. First, the Agreement sets out the "general obligations and disciplines" that apply to all services within GATS and to all members.[25] Some of the general obligations in GATS include: the principle of non-discrimination known as "most favoured nation treatment";[26] the promotion of transparency in relation to laws and regulations that affect trade in services; assurances that regulations affecting trade in services are applied in a reasonable, objective and impartial manner; a safeguard to protect countries facing serious balance of payment difficulties; provisions to increase developing country participation in world trade by strengthening their domestic services capacity, such as through technology transfer, improving their access to information, as well as by opening up markets in sectors relevant to developing country exports;[27] and also, exceptions to the application of GATS in order to protect public morals, as well as human, animal and plant life.

22. Second, GATS sets out rules governing the commitments concerning the liberalization of specific service sectors that each WTO member makes. While the general obligations on members are applicable to all services that come within the scope of GATS, the GATS - specific obligations only apply to those service sectors identified and scheduled by the member in question. Each country makes commitments - set out in a schedule - over 11 service sectors[28] ranging from transport and communication services to health, education and tourism services across the four modes of service supply outlined above. Commitments are made in relation to "market access" and "national treatment".

23. Commitments on "market access" set out the terms, limitations and conditions for market access which a country must apply without discrimination to the services and service suppliers of all WTO members.[29] There are six forms of limitation.[30] A full commitment on "market access" would therefore prohibit a country from limiting access to its services markets. However, a country need not make a full commitment to "market access" and WTO members can determine individually the limitations, conditions and terms of "market access" that fall short of full market access. Such limitations, conditions and terms must be applied without discrimination to the services and service suppliers of all WTO members.

24. Commitments on "national treatment" set out the conditions and qualifications on national services and service supply in a particular country which will be applicable on a non-discriminatory basis to the services and service suppliers of other WTO members. A full commitment on "national treatment" prohibits a State from discriminating - both de jure and de facto - between domestic and foreign "like" services and service suppliers. In determining what constitutes discrimination of like services and service suppliers, much depends on the interpretation of "like". Would, for example, a not-for-profit education service supplier be "like" a for-profit education supplier? Little guidance is given in GATS on how to determine this.

25. As noted above, commitments under "market access" and "national treatment" are made voluntarily and countries' commitments can range from "unlimited market access" to "no commitment", or can subject trade to express limitations or qualifications. Thus, if a country registers "no commitment", it would be able to introduce new restrictions on trade so long as they were consistent with the general obligations imposed under the Agreement. However, where commitments are made, the Government undertakes not to introduce new restrictions. A country can modify or withdraw a commitment after three years have elapsed from the date the commitment came into force. That country will have to enter into negotiations for compensation with any country affected by the modification if requested to do so.[31] Among the 11 sectors, tourism, financial and business services have attracted the most commitments, while health and education services the least - possibly as a result of the closer connection of the provision of these services to the enjoyment of human rights.[32]

26. The Agreement also includes a built-in agenda which mandates further negotiations on the liberalization of trade in services with a view to achieving a higher level of progressive trade liberalization.[33] The negotiations cover two main areas. First, they cover the further development of rules - such as the development of a GATS-specific emergency safeguard mechanism and new rules in areas such as domestic regulations and subsidies. Second, they cover the negotiation of new country-specific commitments for further market access. The negotiations on the development of new rules have been ongoing since the close of the Uruguay Round although progress has been slow. Negotiations on specific commitments in the schedules were mandated to begin in January 2000.

27. In March 2001, WTO members adopted negotiating guidelines and procedures and currently they are in the process of making requests for new commitments to liberalize. The Ministerial Declaration adopted by WTO Ministers at the fourth Ministerial Conference in Doha in November 2001 confirmed that negotiations on services should be completed by January 2005. In relation to the negotiation of specific commitments under market access and national treatment, all WTO members should have submitted their "requests" for other

WTO members to open up their service sectors or to eliminate or change certain domestic regulations by June 2002. Members are currently in the process of designing their "offers" to other members, namely designating which sectors and in which ways they are willing to open their markets.

C. Relevant norms and standards of human rights law

28. The liberalization of trade in several service sectors is relevant to the enjoyment of human rights. Most directly, any commitments in the health, education or environmental sectors can affect the enjoyment of the right to health, the right to education and the right to development. Further, commitments to liberalization in other sectors, such as tourism, telecommunications, advertising, or even prison services, can impact on the enjoyment of human rights. Indeed, the privatization of prison services and its relationship with the administration of justice has already been the subject of study in the Sub-Commission (E/CN.4/Sub.2/1993/22). This section sets out the basic content of the rights to health, education and development as they relate to trade in services, with particular reference to the general comments of the CESCR, as a means of illustrating the standards that countries should bear in mind when liberalizing trade in services.

29. Article 12 of the ICESCR recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[34] The specific steps set out in the ICESCR to be taken by States to achieve the full realization of the right to health include the creation of conditions that would assure to everyone medical service and medical attention in the event of sickness.[35] The Committee on Economic, Social and Cultural Rights has set out the content of the right to health in general comment No. 14 (E/C.12/2000/4), noting that the right is not to be understood as a right to be healthy, but rather a set of freedoms and entitlements concerning health (ibid., para. 8). According to the CESCR, the right to health contains the following essential elements depending on the prevailing conditions in each country (ibid., para. 12). These elements are:

(a) *Availability* - the State party must make available functioning public health, and health-care facilities, goods and services, including safe drinking water, adequate sanitation facilities, hospitals, clinics, trained medical professionals and essential drugs;

(b) *Accessibility* - the State must assure access to health facilities, goods and services without discrimination. Accessibility is assessed according to physical accessibility, economic accessibility and information accessibility. In particular, accessibility includes appropriate resource allocation. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population (ibid., para. 19);

(c) *Acceptability* - the State must ensure that health facilities, goods and services are respectful of medical ethics and are culturally appropriate;

(d) *Quality* - the State must ensure that health facilities, goods and services are also scientifically and medically appropriate and of good quality.

30. Some of the core obligations on States to promote the right to health include the following (ibid., para. 43):

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

(b) To ensure equitable distribution of all health facilities, goods and services;

(c) To ensure access to an adequate supply of safe and potable water.

31. The State may violate the right to health through either its direct action or by the action of other entities insufficiently regulated by the State. Violations of the right to health may include (ibid., paras. 49-52):

(a) The suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health;

(b) The failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational corporations;

(c) The failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others;

(d) The failure to take measures to reduce the inequitable distribution of health facilities, goods and services.

32. The liberalization of trade in educational services is relevant to the enjoyment of the right to education. The right to education is recognized in several international instruments.[36] Article 13, paragraph 2, of the ICESCR recognizes that, "with a view to achieving the full realization of this right:

"(a) Primary education shall be compulsory and available free to all;

"(b) Secondary education in its different forms shall be made generally available and accessible to all, in particular by the progressive introduction of free education;

"(c) Higher education shall be made equally accessible to all, on the basis of capacity, and in particular by the progressive introduction of free education."

33. As with the right to health, the CESCR has set out the basic content of the right in its general comment on the right to education (E/C.12/1999/10), while the Committee on the Rights of the Child has elaborated upon the aims of education in its first general comment (CRC/GC/2001/1). The CESCR has established that, while the realization of the right to education depends on the prevailing conditions in any particular country, the right contains the following elements (E/C.12/1999/10, para. 6):

(a) *Availability* - the State must ensure that functioning educational institutions and programmes are available in sufficient quantity. The requirement that educational institutions function depends on numerous factors, including the development context in which they operate;

(b) *Accessibility* - the State must ensure that educational institutions and programmes are accessible to everyone without discrimination. Accessibility includes physical and economic accessibility. In particular, education must be affordable to all. While primary education shall be free, States are required to introduce progressively free secondary and higher education. In relation to States' obligations to ensure non-discrimination and equal treatment in education, the CESCR has stated that States must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination (ibid., para. 37);

(c) *Acceptability* - the State must ensure that the form and substance of education, including curricula and teaching methods, is acceptable to students and, where appropriate, parents;

(d) *Adaptability* - the State must ensure that education is flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students.

34. In the context of liberalization, it is relevant to note that, while the right to education envisages the progressive realization of free education at all levels, the prohibition of private educational institutions constitutes a violation of the right to education (ibid., para. 59).

35. Internationally, States are specifically obliged to take steps to ensure that, in the negotiation and ratification of international agreements, such instruments do not adversely impact upon the right to education. States also have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education (ibid., para. 56).

36. The liberalization of trade in services is also relevant to the realization of the right to development. The right to development is recognized in the Declaration on the Right to Development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." Three elements of the right to development are particularly relevant to the liberalization of trade in services:

(a) The human person is the central subject of development and should be the active participant and beneficiary of the right to development;[37]

(b) States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting from development;[38]

(c) States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.[39]

37. The independent expert on the right to development has explained that the right to development is both a right to a process of development as well as a right to particular developmental outcomes. The development outcomes referred to include those freedoms and entitlements recognized as fundamental human rights, including basic levels of health care, drinking water, food security, education, safe working conditions and so on. In relation to process, the independent expert has noted that the processes of development should respect fundamental principles and goals of human rights, including the participation of those affected by development in the programming, implementation and monitoring of development. The independent expert has also noted that economic growth is an important element of the "process" of development envisaged by the right to development.[40]

III. THE IMPACT OF TRADE IN SERVICES ON HUMAN RIGHTS

A. Issues arising from the liberalization of trade in services

38. The impact of the liberalization of trade in services on the enjoyment of human rights will take into account a range of issues, not least the type of services being supplied, the mode of service delivery, the development level of the country and its internal infrastructure, the regulatory environment and the level of existing services prior to liberalization. In particular, the effects of services trade liberalization could differ within countries between skilled and unskilled workers, urban and rural populations, rich and poor and so on. The following section will set out some of the opportunities and challenges posed to human rights as a result of the liberalization of trade in services, whether as a result of national policies, bilateral, regional or multilateral agreements or the implementation of World Bank and International Monetary Fund (IMF) programmes. The next section will look specifically at the issues arising in the framework of GATS.

39. In a general sense, the more efficient supply of services in any sector can promote economic growth and development, and therefore could provide the economic means needed to promote human rights. WTO notes that services liberalization can promote economic performance, provide a means for countries to capitalize on competitive strengths, offer lower prices to consumers in areas such as telecoms, promote faster innovations, and encourage technology transfer.[41] However, the liberalization of trade in services, without adequate governmental regulation and proper assessment of its effects, can also have undesirable effects. Different service sectors require different policies and time frames for liberalization and some areas are better left under governmental authority. In her latest report, the Special Rapporteur on the right to education stressed the fact that education is a governmental responsibility and a public service that continues to enjoy the support of the overwhelming majority of Governments in the world. However, the Special Rapporteur noted that exporters of education services have set the tone of education policy, slanting education towards an internationally traded service. The Special Rapporteur posed the question whether education is heading towards progressive

liberalization of trade in education services or progressive realization of the right to education and called for the development of global policy on the right to education at the primary, secondary, and post-secondary levels (E/CN.4/2002/60, paras. 20-21).

40. The following lists some of the opportunities and challenges of liberalizing trade in services according to the "mode" of supply. These observations concentrate on the health and education sectors, although many are also relevant to other sectors which can, directly or indirectly, also affect the enjoyment of human rights:[42]

1. Cross-border supply (mode 1)

41. Cross-border supply of health (telemedicine) or educational services via the Internet offer an important means of promoting access to education and health care, in particular to outlying communities and regions that have low levels of health and education infrastructure. They could also lower costs and allow more rapid access to these services. Nonetheless, access to services via the Internet requires the necessary infrastructure to be in place. If the telecommunications infrastructure does not exist in the country or region in question, or the community or individual concerned does not have the resources - financial or otherwise - to access the Internet, then cross-border supply might not offer many benefits to poor people. Without effective government policies to facilitate access to the Internet for poor people, existing inequalities between wealthy and poor or urban and rural populations might be exacerbated. This calls into question Governments' human rights obligations to ensure that health care and education services are both "available" and "accessible" to the people in their territories. Further, the Internet also poses regulatory problems for Governments. Governments might have difficulties ensuring the "acceptability" of services due to difficulties in ensuring the quality and content of health and educational services. It should, however, be noted that little *commercial* telemedicine as yet takes place across national borders. Finally, if Governments practice censorship of the Internet, this could affect individuals' civil and political rights to access some of the benefits offered by cross-border supply of services, which in turn could affect economic, social and cultural rights such as the right to education.

2. Consumption abroad (mode 2)

42. Increasingly, people are travelling overseas to seek medical treatment or to study. Where sending countries do not have adequate health or educational infrastructures, service consumption abroad can benefit people from both importing and exporting countries. In some cases, consumption abroad could be a means of implementing international cooperation provisions under human rights law, where, for example, scholarships are offered to poor overseas students. Similarly, income from foreign service users could be used to improve local health and education structures for the disadvantaged. However, trade in services based on consumption abroad can also introduce dual market structures and aggravate inequalities in service supply if careful government regulation and cross-subsidization policies are not implemented. For example, the education curriculum might direct itself more to satisfying the needs of paying foreign students than non-paying local students, and nationals might suffer or even be refused places in courses. Similarly, health systems could focus on providing expensive elective treatment for wealthy foreigners at the expense of preventive care for the poorer

segments of society. From a human rights perspective, this raises questions of discrimination, as well as "accessibility" and "quality" of health care and the "acceptability" and "adaptability" of education services.

3. Commercial presence (mode 3)

43. One of the benefits offered by the liberalization of services in mode three is the possibility of increasing foreign direct investment (FDI). Targeted FDI can upgrade national infrastructures, introduce new technologies and provide employment opportunities. Further, FDI can help reduce the burden on government resources which could then be directed to improving the public sector. FDI can also supplement government expenditures in essential services by supplying services which the Government was unable to supply before.

44. At the same time, the increased presence of foreign - as with national - private suppliers of essential services can pose challenges to Governments as the guarantors of human rights. Specifically, the introduction of user fees can reduce and even cut off service supply to the poor, marginalized or vulnerable. In the health sector, privatization may result in two-tiered service supply with a corporate segment focused on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick. This in turn can lead to a brain drain with better trained medical practitioners and educators being drawn towards the private sector by higher pay rates and better infrastructures. Given that FDI is primarily driven by commercial objectives, the promotion of FDI in areas such as the health, water and education sectors will not necessarily be the most effective means of ensuring universal access to entitlements that at times can be unprofitable. Further, privatization that is leading to an increasingly large and powerful private sector can also threaten the Government's role as primary duty bearer for human rights. In the health sector, WHO has indicated that private sector companies can subvert health systems through political pressure and "regulatory capture", namely the co-opting of regulators to make regulations more favourable to them.[43]

45. To the extent that these phenomena can be linked to the liberalization of trade in services, regulators need to be conscious of ensuring that liberalization policies take into account State responsibilities to respect, protect and fulfil human rights. Human rights law does not place obligations on States to be the sole provider of essential services. However, States must guarantee the availability, accessibility, acceptability and adaptability/quality of essential services, including their supply, especially to the poor, vulnerable and marginalized, and to do so requires constant monitoring of policies and targeted action on behalf of independent regulators. These observations apply not only to the health and education sectors, but also to other sectors such as telecommunications which are important technological inputs that promote the realization of the right to development. For example, the World Bank has noted that liberalization could increase prices of some services and threaten the provision of transport and telecommunications services to the poor.[44]

46. Mode 3 is therefore possibly the most problematic for the protection of human rights, raising both opportunities and challenges, in particular concerning the "availability" and "accessibility" of health and education services. In particular, the commercialization of

education services does not sit easily with States' commitments to make education progressively free at all levels. Further, the increasing power of the private sector in relation to Governments raises challenges to the capacity of the State as primary duty bearer for human rights.

4. Movement of natural persons (mode 4)

47. Reducing barriers to the transborder movement of service suppliers offers significant opportunities, in particular to service suppliers in developing countries in the areas of health, transport, construction and distribution. Indeed, mode 4 holds much potential for developing countries which could allow for much greater movement of the workforce in these countries. Increased mobility for service suppliers allows greater exchange of knowledge and experience that can improve service provision, particularly if the service suppliers return to the home country. While working overseas, service suppliers benefit from higher wages and better conditions of work, and the home country can also benefit if the service provider sends remittances and money transfers. However, there is also the risk that the movement of service suppliers will be permanent or semi-permanent, resulting in brain drain and therefore reductions in the quality and availability of supply in essential services in the source country. In the health sector in particular, brain drain is of major concern for developing countries with medical practitioners moving from middle-income to high-income countries and from low-income to middle-income countries. This can impose significant cost to the enjoyment of human rights in the source country by reducing the number and quality of medical practitioners and loss of return on investment in education and training of practitioners. Further, any remittances returned to the source country will not generally be channelled through the public sector. Moreover, the poorest countries bear the greatest burden resulting from brain drain.[45] Another issue that can arise concerns the treatment of service suppliers in the host countries, in particular where foreign service suppliers receive lower pay rates or the host country does not ensure respect for their labour and other rights. In its worst manifestation, people could be trafficked in order to provide services. Neither trade law nor human rights law sanctions such illegal trade, and this is an important area where the promotion of human rights provides a complement to trade law. It should be stressed that mode 4, in promoting freedom of movement, generally links positively with the promotion of human rights and could be beneficial to many people living in poorer countries in the future. In this regard, the High Commissioner refers to States' responsibilities to protect the human rights of workers contained in the ICESCR and encourages States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

48. Not only do the effects of liberalization widely differ across "modes" of supply, they also differ according to the sector. For example, the World Bank has noted liberalization success stories in the field of information and communications technology.[46] According to the World Bank, Indian software exports grew from $225 million in 1992/93 to $1.75 billion in 1997/98 with projected annual revenues of $87 billion and 2.2 million jobs. By 2008, the information technology sector could account for 35 per cent of India's exports and attract $5 billion of FDI a year. The liberalization of telecommunications has also led to great improvements in service supply, particularly in East and South Asia. A World Bank study on telecommunications reviewed the experience of liberalizing telecommunication services in East, South-East and southern Asian countries, indicating a positive contribution of liberal policy to the performance of telecommunications services in Asian developing countries. The study

indicated that with the availability of improved telecommunications technology and the liberalization of telecommunications services, the number of telephone users in the region is estimated to have trebled between 1990 and 2000 and that, despite the financial crises that hit the region in the latter part of the 1990s, Asia's share of fixed telephone lines in the world has grown from 23 per cent in 1990 to 33 per cent in 2000.[47] Given the importance of information and telecommunications to providing infrastructure in other development areas, including health and education, this can be seen as an example of how liberalization can promote the right to development, and other human rights.

49. Nonetheless, in spite of some of the opportunities offered through increased trade in services, liberalization of essential service sectors can also have negative effects. There is currently a dispute before the International Centre for the Settlement of Investment Disputes of the World Bank concerning the liberalization of water services between the Government of Bolivia and a private water service supplier. In Cochabamba, Bolivia, the city's water system was liberalized to the subsidiary of a foreign service provider, leading to price increases of more than 35 per cent. This resulted in mass demonstrations and strike action that led the Government to reverse the decision to liberalize the sector and restore public ownership.[48] The reversal of the decision to liberalize water services is consistent, under the circumstances, with the Government's obligation to ensure access to an adequate supply of safe drinking water as a component of the right to health. Importantly, not only is access to drinking water a human rights in itself; the enjoyment of this right is fundamentally linked to the guarantee of other rights such as the right to health, the right to food and the right to adequate housing. The action lodged by the service supplier against the Bolivian Government is still pending.[49]

50. The liberalization of trade in services can therefore have varied impacts on the enjoyment of human rights, across "modes" of supply, across service sectors, from country to country and depending on the individual concerned. The key question from a human rights perspective is not whether liberalization does or does not promote human rights; rather, it is how to determine the right form and pace of liberalization to ensure the protection of human rights and how to reverse policies that are unsuccessful. The World Bank, in noting that unregulated liberalization can lead to the replacement of public monopolies by private monopolies, poor investment decisions and insider trading, as well as no improvement in access to essential services for the poor, has stressed the need for effective competition policy, corporate transparency and policies to ensure universal service to accompany liberalization.[50] Similarly, a report to the WHO Commission on Macroeconomics has highlighted the need for appropriate regulations, safeguards and supporting policies to meet the goals of equity and efficiency, noting that the impact of trade in health services on equity, access, costs, and quality of health services is in large part dependent on the policies and safeguards governments put in place.[51] In human rights terms, the need to regulate, as highlighted by the World Bank and WHO, is in fact a duty to regulate; the obligation on States to "fulfil" human rights requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.[52] Moreover, in order to ensure the adoption of the most appropriate policies and regulations, assessments of the potential and actual impact of services policies are fundamental. However, developing countries often do not have the capacity or infrastructure either to undertake assessments or to develop and implement the most appropriate regulations. In the context, the High Commissioner identifies this as an appropriate area for developed countries to fulfil their obligations and provide international cooperation and assistance.

B. Issues arising from GATS

51. While many policies, agreements and laws drive and shape the liberalization of trade in services, GATS is significant as the first multilateral agreement to set a legal framework to the liberalization process. Given the opportunities and challenges posed by the liberalization of trade in services to the enjoyment of human rights, it is important to understand the interaction between the rules and disciplines in the GATS and the norms and standards of human rights law. The following section sets out the main issues that arise in considering GATS in light of States' obligations under human rights law.

52. *Scope of GATS.* GATS applies to all measures by WTO members affecting trade in services and applies to all services with the exception of those services provided in the exercise of governmental authority. Thus, GATS applies to:

(a) All measures affecting trade - this includes measures taken at all levels of government whether central, regional or local government;[53]

(b) All trade in services - namely across the four "modes" of service supply;[54]

(c) All services with the exception of those provided in the exercise of governmental authority. A service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.[55]

53. The scope of GATS is consequently broad. It involves measures taken by all levels of government, across all modes of supply and across all service sectors. The exclusion of services supplied in the exercise of governmental authority could be significant from a human rights perspective given the role of Government as the primary duty bearer for human rights as well as the traditional importance of government service supply in areas relevant to the enjoyment of human rights such as health, education and water. The exclusion of governmental services, however, is qualified. It relates only to those governmental services supplied, first, not on a commercial basis and, second, not in competition with other suppliers. Given that many essential services that promote human rights are delivered through a mix of public and private service delivery, many governmental services might still come within GATS. The exact scope of GATS has therefore provoked much discussion.[56]

54. Understanding which services fall within GATS is important. If GATS does cover a service, then all the general obligations - the first form of non-discrimination mentioned above (most favoured nation), transparency and so on - will apply to measures at the central, regional and local government level over all modes of supply. This is so, even where a country has not made voluntary commitments to market access and national treatment over specific service sectors in the country-specific schedules. For example, country A, a WTO member, did not make any commitments to liberalize trade in health services in its schedule. The Government runs many of the national hospitals, although private companies also provide hospital services and run some hospitals. However, there is a shortage of medical practitioners in the government hospitals which is affecting the enjoyment of the right to health. In an effort to meet its human rights obligations, country A enters into a bilateral agreement with country B -

another WTO member - allowing medical practitioners from that country to supply health services in country A on a temporary basis. In spite of the fact that country A has not made commitments to liberalize trade in health services in its schedules, the agreement with country B might be in violation of GATS if health services such as these come within the scope of its general obligations. This is because the bilateral agreement with country B might violate the principle of most favoured nation treatment as it gives preferential treatment to service suppliers from one WTO member over others. However, in this scenario, if health services do not come within the scope of GATS, there would be no violation of GATS.[57] Given the fact that the Government's actions were undertaken to fulfil the right to health, the interpretation of the actual scope of GATS might affect a State's ability to respect, protect and fulfil human rights in this hypothetical example. It is important to note that measures taken by Governments to respect, protect and fulfil human rights might in some, and possibly many, cases also come within the scope of GATS and therefore be subject to its rules. The High Commissioner highlights the broad scope of the GATS and encourages interpretations of its scope to ensure that GATS obligations do not constrain Governments from taking action to promote or protect human rights.

55. *The right to regulate.* The regulation of service supply for economic, social and environmental reasons is a legitimate area of public policy and an important means of promoting and protecting human rights. Such regulation can take different forms, including quality and safety standards or professional practice standards. Subsidies, the obligation to provide universal services, or disciplines on anti-competitive practices are other forms of governmental regulation that can be important to the services sector. The preamble to GATS specifically recognizes "the right of Members to regulate and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives" and accepts the particular need of developing countries to exercise this right. In human rights terms, the Declaration on the Right to Development declares that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals ...".[58] Indeed, what is referred to as a right under GATS is in fact a duty to regulate under human rights law.

56. *Domestic regulation.* Nevertheless, regulations are "measures" that come within the scope of GATS[59] which means that - even in the absence of commitments - the general obligations such as the principle of non-discrimination (known as most favoured nation) under the Agreement will apply to domestic regulations. Further, GATS contains specific provisions on a particular subset of domestic regulations, namely those related to technical standards, licensing and qualification requirements and GATS includes a mandate for the negotiation of new disciplines in this area.[60] [61] Specifically, the mandate aims at devising means to ensure that such regulations or measures do not constitute unnecessary barriers to trade by ensuring that they are based on objective and transparent criteria and are not more burdensome than necessary to ensure the quality of the service.[62]

57. So far, WTO members have devised such disciplines for one particular services sector, namely accounting services, and they are currently discussing disciplines for other service sectors. The most significant element of these disciplines has been the introduction of a "necessity test" - a requirement that measures relating to licensing, technical standards and qualifications are not more trade-restrictive than necessary to fulfil the legitimate policy objective the regulation aims to achieve.[63] In other words, even where a domestic regulation

relating to qualifications, technical standards or licensing requirements is applied in a non-discriminatory manner, it might still be considered inconsistent with GATS if it is considered to be "more trade-restrictive than necessary".

58. On the one hand, the "necessity test" would not stop a Government regulating services; it would only require a regulator to use the least trade-restrictive means which it could reasonably be expected to employ to achieve the particular level of protection of the legitimate objective pursued - for example, a particular safety requirement. On the other hand, a measure calculated to promote the enjoyment of human rights - for example health or water safety standards - might have to consider its trade-restrictiveness as one of its decisive elements. The question arises whether this has the effect of subordinating human rights obligations to trade rules. The High Commissioner emphasizes that a human rights approach to trade sets the enjoyment of all human rights among the objectives of trade liberalization, not as an issue secondary to trade objectives. In this sense, any judgement of the trade-restrictiveness of a measure should take into account States' obligations under human rights law.

59. *Non-discrimination.* While the principle of non-discrimination exists under both human rights and trade law, the High Commissioner has already highlighted that there are distinctions in the application of the principle. Under trade law, the second form of the principle of non-discrimination referred to above, known as "national treatment", envisages equal treatment for national services or service suppliers and "like" foreign services or service suppliers - whether large corporations or small and not-for-profit service organizations or government service suppliers. Under human rights law, the principle of non-discrimination goes beyond this in nature and substance. As noted above, under human rights law, States undertake to guarantee that rights will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and that any distinction, exclusion, restriction or preference which is based on any of these grounds will constitute a violation of the principle.[64] Importantly, the human rights principle does not envisage according equal treatment to everyone in all cases, but rather supports affirmative action in the interests of promoting the human rights of the poor and vulnerable (E/CN.4/2002/54, para. 43). Understanding the nature of the application of the trade law and human rights law principle of non-discrimination will be important, particularly given the recent acknowledgment of the International Law Commission that the principle of non-discrimination, at least on the basis of race, is clearly accepted as a peremptory norm of international law - an indication of the fundamental nature of the human rights principle of non-discrimination (A/56/10, p. 208).

60. Take the case of subsidies. Although subsidies are tools of disputed value, they have been used successfully, in particular to protect domestic industry and services as well as to promote greater equality in service delivery. "Cross-subsidization" such as government schemes ensuring that wealthy people subsidize access to health care for the poor or maintaining lower interest rates for loans in rural as compared to urban areas, can be a means of reducing poverty, assisting the development of local infant service suppliers, increasing universal access to essential services and thus promoting human rights. GATS subjects the grant of subsidies to the trade principle of non-discrimination. According to the non-discrimination (national treatment) principle, where a Government has made commitments in a particular service sector in its schedule under national treatment, GATS requires subsidies to national service suppliers or

services to be available to like foreign service providers and services, unless an exception is specifically made in the national schedule. Thus, for example, where commitments were made in the education sector, the Government that provides a subsidy to a domestic not-for-profit education service provider might have to provide the same subsidy to a foreign for-profit service providers.

61. The example raises many issues and depends on many variables.[65] However, if the requirement to provide a subsidy to all like service providers leads to the withdrawal of the government subsidy, the question arises as to the effect on the realization of the right to education. Further, does the application of the principle of non-discrimination in this situation have the effect of denying to Governments - in particular developing country Governments - the possibility of using development tools such as subsidies that have been generously used in the past by wealthier countries? What then is the impact on States' ability to promote the right to development? If the application of trade law, or even trade liberalization policies generally, threatens "cross-subsidization" or other policies guaranteed to ensure universal service supply or raises prices of services for the poor,[66] the reduction in quality and quantity of services to the poor, isolated or vulnerable might result in de facto discrimination under human rights law.

62. GATS mandates negotiations on subsidies in order to develop disciplines to avoid their possible trade-distortive effects. Significantly, the mandate for these negotiations specifically refers to the need to ensure flexibility in recognition of the role of subsidies in relation to development programmes of developing countries.[67] While the discussions on subsidies have so far been superficial,[68] the High Commissioner welcomes the specific reference to the need to take into account the concerns of developing countries and encourages all WTO members to acknowledge in any such negotiations the responsibility of all countries to respect human rights. Moreover, the High Commissioner underlines that it will be important for States to take a cautious approach when making commitments to open services markets in their schedules. The High Commissioner also highlights the need to ensure that the application of trade principles takes into account the human rights principle of non-discrimination, including by safeguarding the need to create mechanisms to ensure that the poor have adequate access to services in liberalized markets.

63. *General exceptions*. GATS includes general exceptions to protect public morals as well as human, animal and plant life and the protection of the privacy of individuals (in relation to the processing and dissemination of personal data).[69] The protection of public morals, life and privacy are familiar themes to human rights law and their inclusion in GATS could be seen as a link to the promotion and protection of human rights, such as the right to life, the right to health and aspects of the right to privacy. While a human rights approach would place the promotion of human rights at the centre of the objectives of GATS rather than as permitted exceptions, these links nonetheless provide an entry point for a human rights approach to liberalization and a means of ensuring that the essentially commercial objectives of GATS can be implemented with respect for human rights. This link could also be relevant in determining the appropriate sources of international law relevant to the interpretation of the provisions of GATS in future rulings by the WTO Dispute Settlement Body or the Appellate Body.

64. *Modifications of schedules*. GATS includes the possibility of modifying or withdrawing commitments entered into a schedule with a requirement that the modifying State will enter into

negotiations at the request of any WTO member affected by the change with a view to reaching agreement on any necessary compensatory adjustment.[70] Modification of schedules might be necessary to protect against the unforeseen consequences of commitments to liberalize which can disproportionately affect the poor or vulnerable - in particular where proper assessment of the potential affects of liberalization was not undertaken. The question arises, however, whether compensation in all cases of modification or withdrawal is appropriate. From a commercial perspective, holding countries to their commitments to liberalize is important to ensure transparency and predictability in international trade and the payment of compensation is a legitimate commercial response to the settlement of disputes. From a human rights perspective, however, the focus is less on predictability and more on the need for flexibility to modify or withdraw commitments to liberalize trade in services where experience demonstrates that a commitment constrains or limits the enjoyment of human rights. The need for flexibility is particularly relevant for developing countries given that they are in a dynamic process of building social infrastructures. For these countries, as the level of social development changes, the most appropriate form and pace of liberalization might fluctuate accordingly. Moreover, while compensation to affected parties might be appropriate in some cases upon withdrawal of commitments, a human rights approach would question whether States should be sanctioned for taking action to protect human rights. In particular, the requirement of paying compensation might act to discourage States from action which, in turn, could reinforce the status quo or even exacerbate existing problems. Any eventual interpretation of the scope of the general exceptions in GATS to protect public morals, life and health might be important in resolving the potential tension between ensuring transparency and commercial predictability and protecting human rights.

65. *Progressive liberalization and assessments.* As already noted, the preamble to GATS sets the early achievement of progressively higher levels of liberalization of trade in services as one of its objectives. This objective is specifically reinforced in the context of the negotiations on country commitments on specific service areas. The Agreement states that "(t)he process of progressive liberalization shall be advanced in each such round [of negotiations] through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by members".[71] From a human rights perspective, it will be essential that, in meeting the objective of progressive liberalization under trade law, WTO members also meet their concurrent obligation of progressive realization of human rights - in particular, taking into account the fact that certain services are entitlements, not privileges, and should be guaranteed by the State. Much will depend on the commitments that States make to open markets in their schedules.

66. As already noted, commitments under GATS are voluntary and determined through negotiations with other WTO members. Given the various issues that arise in the liberalization of trade in services, the commitments made to opening markets could have fundamental consequences for States' ability to meet their obligations under human rights law. Opening some sectors in some ways might have positive impacts on growth and development while other sectors, particularly health and education and sectors that affect water supply, should be treated very carefully and might require more sophisticated supplementary measures or sequencing. While health and education commitments are currently the lowest-committed sectors, this might change in response to negotiating pressures.

67. The High Commissioner therefore encourages States to open markets through WTO negotiations only on the basis of sound empirical evidence gathered through assessments. In this sense, the High Commissioner welcomes the Guidelines and Procedures for the GATS negotiations that mandate the Council for Trade in Services in special sessions to continue to carry out assessments of trade in services in overall terms and on a sectoral basis and to adjust negotiations on the basis of such assessments.[72] In fulfilment of this mandate, the High Commissioner encourages States to undertake human rights assessments and to raise these in the Council on Trade in Services. Those assessments should seek to understand better the impact of actual and potential trade policies on the enjoyment of human rights such as health, education, drinking water supply and development, and further should be based on thorough consultation with the people affected by liberalizing trade in services - the poor, rural populations, vulnerable groups, industry and Government, including the education, health, environment, transport ministries, not only trade and finance departments. Such assessments will be important, not only in assessing the impact of existing liberalization commitments, but also in examining the potential impact of future policies, before any further commitments to liberalization are undertaken. In particular, given the difficulty in reversing commitments to liberalization, assessments will be important in assisting States to find the most appropriate liberalization policies to meet national development and human rights objectives. The High Commissioner underlines the importance of developed countries' sharing both financial and technical expertise to support developing countries to undertake human rights assessments of liberalization.

IV. CONCLUSIONS AND RECOMMENDATIONS

68. The liberalization of trade in services presents both opportunities as well as challenges to the enjoyment of human rights. While liberalization offers opportunities for increased economic growth and development, the liberalization process, in particular where it leads to unregulated private sector activities, can threaten universal access for the poor to essential services. States hold responsibilities, both nationally and internationally, to guarantee universal service supply according to national capacities and should therefore not leave the concerns of human welfare solely to market forces. Developing human rights approaches to GATS by negotiating, interpreting and implementing trade rules in accordance with the norms and standards of human rights will maximize the benefits of the international trade in services while minimizing its challenges. Moreover, adopting human rights approaches to GATS will help States reconcile their obligations under human rights and trade law. Put simply, a human rights approach seeks the means by which the progressive liberalization of trade in services can take place in a way that advances the objective of promoting and protecting human rights. The conduct of negotiations that achieve significant results of liberalization in areas in which there is the greatest positive impact on people - such as under mode 4, the movement of natural persons - could be one step to achieve this. The High Commissioner identifies the following areas of action as a step in elaborating human rights approaches to the liberalization of trade in services.

69. *Ensuring equal access for basic services.* The High Commissioner emphasizes that all people are entitled without discrimination to certain levels of health care, education, drinking water supply and other basic services and that these entitlements should be protected in the processes of liberalization and privatization. In particular, the High Commissioner emphasizes that States, in spite of their diminishing role in service supply, should not rely solely on market

forces to resolve problems concerning human welfare. While increasing investments from the local and overseas private sector can assist States in the provision of basic entitlements, the State has the responsibility of ensuring the delivery of services on a non-discriminatory basis, even where this might be unprofitable. Consequently, the High Commissioner encourages States to take action to ensure universal supply of essential services, including through the use of affirmative action to ensure provision of services to the poor, isolated and marginalized, taking into account national circumstances and capacities.

70. *Ensuring Governments' right and duty to regulate.* The High Commissioner encourages States to ensure that they have the flexibility at the local, regional and central government level to use development tools in order to exercise their "right and duty to formulate appropriate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals".[73] In particular, the High Commissioner encourages interpretations of GATS provisions that acknowledge the need for countries to retain the flexibility to use development tools, such as cross-subsidization or the regulation of corporate governance, in response to national development needs and to promote universal service supply - in particular for developing countries that are still in the process of establishing social infrastructures as the foundation for progressively realizing human rights. In this regard, the High Commissioner welcomes the recognition in GATS of States' right to regulate and to introduce new regulations and its reiteration in the Declaration of the fourth WTO Ministerial Conference held in Doha in 2001.

71. *Encouraging interpretations of GATS that are compatible with human rights.* The High Commissioner reminds WTO members of their concurrent obligations under human rights law. Consequently, she encourages interpretations of GATS that acknowledge States' obligations to respect, protect and fulfil human rights, including by ensuring that the broad scope of GATS rules does not constrain Governments in taking action to promote and protect human rights. Further, the High Commissioner encourages WTO members to acknowledge explicitly that the promotion and protection of human rights are legitimate objectives and binding obligations to be taken into account in the process of trade liberalization. In the context of future negotiations on subsidies or domestic regulations, the High Commissioner encourages the development of rules or "tests" that acknowledge and protect States' duties concerning human rights in determining or assessing whether a measure is trade restrictive.

72. *Undertaking human rights assessments of trade policies.* The High Commissioner highlights the voluntary nature of commitments to liberalize trade in services and stresses the need to make commitments on the basis of sound empirical evidence. To this end, the High Commissioner encourages States to undertake public, independent and transparent human rights assessments of the impact of liberalization policies - both past policies and future options - on the enjoyment of human rights, through a participatory and consultative process with concerned individuals and groups. The High Commissioner encourages States to use these assessments as the basis for WTO negotiations on progressive liberalization. Where assessments are not available, the High Commissioner encourages States to adopt a cautious approach to making new commitments until the relevant facts are available. Further, where assessments indicate negative effects of past liberalization policies on the enjoyment of human rights, then the High Commissioner encourages WTO members to allow the maximum flexibility to these countries to withdraw liberalization commitments.

73. *Providing international cooperation and assistance.* International cooperation and assistance is a fundamental aspect of international human rights obligations and a necessary measure to secure a just and equitable international and social order. In this regard, the High Commissioner reminds developed countries of their commitment, made at the special session of the General Assembly on follow-up to the World Summit on Social Development held in Geneva in June 2000, to provide 0.7 per cent of GDP as official development assistance. In particular, the High Commissioner encourages donor countries to provide financial and technical assistance to developing countries to undertake human rights assessments. Similarly, donor countries could assist developing countries, through financial assistance and sharing of know-how on the means and mechanisms for promoting universal service supply, as well as for establishing transparent and independent bodies to regulate corporate governance. Further, the High Commissioner reminds States of their responsibility to take into account their obligations in the field of economic, social and cultural rights when entering into multilateral agreements with other States and in this regard, specifically recommends that larger WTO members, particularly developed countries, negotiate in ways that enable poorer countries to maintain the maximum flexibility to develop policies to meet commitments to the progressive realization of human rights.

74. *Increasing dialogue on human rights and trade.* The High Commissioner stresses the need for greater understanding of the inter-reaction between trade liberalization and the enjoyment of human rights as a means of achieving greater balance and coherence in international law and policy-making. In particular, the High Commissioner highlights the need to improve the dialogue between human rights, trade, finance and environmental practitioners and encourages more concerted consultation in this respect. At the national level, the High Commissioner encourages improved consultation between social sector and trade/finance ministries and encourages greater dialogue with civil society. Within civil society groups, the High Commissioner encourages dialogue between trade and human rights organizations at the national and international levels. At the international level, the High Commissioner encourages greater consultation between delegates to the WTO and delegates representing the same country at the Commission on Human Rights, specifically on the links between human rights and trade and on particular ways to ensure coherence in policy and rule making.

75. *Future work.* The High Commissioner notes that the scope of GATS and the application of its rules remain untested and is still in a process of development. As the negotiations proceed over the next three years, the openness of the system and the compatibility of progressive liberalization under GATS and progressive realization of human rights will become clearer. Consequently, the High Commissioner encourages the Sub-Commission to retain this issue on its agenda and to review the negotiations as they proceed with a view to ensuring maximum coherence between the rules and policies of trade liberalization and the enjoyment of human rights. For further work on human rights and trade generally, the High Commissioner recommends that the Sub-Commission consider requesting a report on "human rights, trade and investment".

Notes

[1] Universal Declaration on Human Rights (UDHR), preamble.

[2] The Committee is charged with monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[3] The Declaration on the Right to Development, article 2 (1); see also article 2 of the Universal Declaration, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind ...".

[4] Human Rights Committee, General Comment No. 18 on "Non-discrimination".

[5] Declaration on the Right to Development, article 2 (3).

[6] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 6.

[7] Maastricht Guidelines, paras. 2 and 18.

[8] See, e.g., ICESCR, article 2 (1): "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[9] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, paras. 21-23.

[10] Maastricht Guidelines, para. 14. Similarly, the calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure.

[11] See, e.g., UDHR, article 28, "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"; Limburg Principles, para. 30.

[12] See, e.g., UDHR, article 22; ICESCR, article 2 (1); Declaration on the Right to Development, article 2 (3).

[13] Maastricht Guidelines, para. 15.

[14] Organization for Economic Cooperation and Development (OECD), "Open Services Markets Matter", Trade Directorate, Trade Committee, Working Party of the Trade Committee, December 2001 (TD/TC/WP(2001)24/FINAL), p. 14.

[15] Rupa Chanda, "Trade in Health Services", World Health Organization, Commission on Macroeconomics and Health, Working Paper No. WG.4:5, Geneva, June 2001, pp. 1-2.

[16] See GATS, article 1 (2).

[17] World Bank, Global Economic Prospects, "Trade in Services: Using Openness to Grow", Washington D.C., October 2001, p. 71. WTO, "Market Access: Unfinished Business - Post Uruguay Round Inventory and Issues", Special Studies 6, WTO, Geneva, April 2001, p. 98.

[18] TD/TC/WP(2001)24/FINAL, pp. 11-14.

[19] WTO, "Market Access", op. cit., p. 97.

[20] GATS, article 1.

[21] GATS, preamble. The preamble notes, "wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries".

[22] GATS, article XXIV.

[23] GATS, article II.

[24] GATS, article XVII.

[25] GATS, see generally Part II (General obligations and disciplines) and Part III (Specific commitments).

[26] GATS, article II (1) states that "With respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country."

[27] GATS, article IV.

[28] The 17 sectors are business (including professional and computer) services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial (insurance and banking) services, health-related and social services, tourism and travel-related services, transport services, other services.

[29] GATS, article XVI (1).

[30] The six permitted limitations are: limitations on the number of service suppliers; limitations on the total value of service transactions or assets; limitations on the total number of service operations or on the total quantity of service output; limitations on the total number of natural persons that may be employed in a particular service or that a service supplier may employ; measures that restrict or require specific types of legal entity or joint venture; and limitations on the participation of foreign capital.

[31] GATS, article XXI, "Modification of Schedules".

[32] WTO, "Market access", op. cit., p. 104.

[33] GATS, article XIX.

[34] See also UDHR, article 25, Convention on the Rights of the Child, article 24.

[35] ICESCR, article 12 (d).

[36] UDHR, article 26, ICESCR, articles 13 and 14, Convention on the Rights of the Child, articles 28 and 29.

[37] Declaration on the Right to Development, article 2 (1).

[38] Declaration on the Right to Development, article 2 (3).

[39] Declaration on the Right to Development, article 4 (1).

[40] See E/CN.4/2002/WG.18/2, section I, in particular, references to GNP in paragraph 3. Further, see the report of the Open-Ended Working Group on the Right to Development (E/CN.4/2002/28, conclusions and recommendations) that noted the need to make available to all the benefits of information and communication technologies as an element of the right to development.

[41] WTO, "GATS - Fact and Fiction", from http://www.wto.org. TD/TC/WP(2001)24/FINAL, p. 16. To illustrate some of the benefits flowing from liberalization, the OECD refers to empirical research indicating that in Egypt, output stood to rise by as much as 4 per cent should service sectors become more open to competition. The OECD also notes that liberalization of telecommunications, construction, transportation, business and insurance, distribution and finance services could provide welfare gains equivalent to 7 per cent of GDP in Tunisia while Indian welfare could expand by 0.7-1.4 per cent of GDP following a 25 per cent global reduction in services protection.

[42] The following summary is adapted from Chanda, op. cit., pp. 15-25.

[43] WHO, The World Health Report 2000: Health Systems, Improving Performance, WHO, Geneva, 2000, pp. 128-129.

[44] World Bank, "Global Economic Prospects", op. cit., p. 80.

[45] Chanda, op. cit., pp. 22-23. Chanda notes that brain drain in the health sector is of major concern for developing countries and gives the example of South Africa where an estimated 10,000 health professionals emigrated from the country during the 1989-1997 period, with the majority going to the United Kingdom and the United States. In Ghana, some 60 per cent of Ghanaian doctors trained locally during the 1980s left the country and there are over 21,000 Nigerian doctors practising in the United States. Even developed countries such as Canada have experienced brain drain to the United States.

[46] World Bank, Global Economic Prospects, op. cit., p. 73 and Carsten Fink, A. Mattoo and R. Rathindran, "Liberalizing Basic Telecommunications: The Asian Experience", The World Bank, November 2001.

[47] Fink, op. cit., pp. 3, 6, 13 and 17. The study also found that comprehensive reform - by which it meant privatization, competition and regulation - was also associated with higher levels of mainline availability, service quality and labour productivity. However, the study emphasized the need for a nuanced approach to liberalization, stressing the importance of effective government regulation of services and the need for managed competition.

[48] J. Hilary "The Wrong Model: GATS, trade liberalization and children's right to health", Save the Children, London, 2001, p. 43.

[49] *Aguas del Tunari S.A. v Republic of Bolivia* (Case No. ARB/02/3) registered 25 February 2002. For more information see http://www.worldbank.org/icsid/cases/pending.htm.

[50] World Bank, "Global Economic Prospects", op. cit., p. 78.

[51] Chanda, op. cit., p. 24.

[52] Maastricht Guidelines, para. 6.

[53] Article I (3) (a) clarifies that "measures by members" includes any measure taken by (i) central, regional or local governments and authorities as well as (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

[54] GATS, article 1 (2).

[55] GATS, article 1 (1) and 1 (3) (b) and (c).

[56] For a review of different positions, see WTO, "GATS - Fact and Fiction", http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm (accessed on 29 April 2002); S. Sinclair and J. Grieshaber-Otto, "Facing the Facts: A guide to the GATS debate", Canadian Centre for Policy Alternatives, Ottawa, 2002; OECD, op. cit.

[57] The health example was adapted from Krajewski, M., "Public Services and the Scope of the General Agreement on Trade in Services (GATS): A research paper", written for the Centre for International Environmental Law (CIEL), Geneva, 2001, p. 5. The research paper gives another example of a country that makes an unconditioned market access commitment under mode 3 (commercial presence) in postal services. If the country maintains a monopoly for its national postal service concerning letter distribution (but not in other postal services), this monopoly could violate GATS disciplines on monopoly providers (article VIII) and the market access commitments (article XVI). This would only be in the case where the supply of postal services would be covered by the GATS.

[58] Declaration on the Right to Development, article 2 (3).

[59] GATS, article XXVIII defines a "measure" as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

[60] GATS, article VI.

[61] Examples of these are: qualification requirements - professional accreditation, educational requirements, certification of competency. Licensing requirements - broadcast licences, university accreditation, facilities licensing for clinics, hospitals and laboratories, waste disposal permits. Technical standards - water quality standards, pipeline safety, toxic waste disposal and storage standards.

[62] GATS, article VI (4).

[63] WTO, "Market Access", op. cit., p. 123.

[64] See common article 2 of the two International Covenants on Human Rights and Human Rights Committee, General Comment No. 18, 1989, paras. 8 and 10.

[65] For example, the question arises whether a for-profit and a not-for-profit organization would be considered "like" service providers. Another issue concerns territorial application of trade rules - a Government could not be obliged to subsidize the cross-border delivery of such a service, where the service supplier is located outside of the country.

[66] World Bank, Global Economic Prospects, op. cit., p. 80 states "If a country is a relatively inefficient producer of a service, liberalization and the resultant foreign competition are likely to lead to a decline in domestic prices and improvement in quality. But there is a twist. Frequently, the prices before liberalization are not determined by the market but set administratively, and are kept artificially low for certain categories of end-users and types of services products. Thus rural borrowers may pay lower interest rates than urban borrowers, and prices of local telephone calls and public transport may be kept lower than the cost of provision. This structure of prices is often sustained through cross-subsidization within public monopolies, or through government financial support. Liberalization threatens these arrangements."

[67] GATS, article XV.

[68] WTO, "Market Access", op.cit., p. 121.

[69] GATS, article XIV.

[70] GATS, article XXI.

[71] GATS, article XIX.

[72] Council for Trade in Services, Guidelines and Procedures for the GATS 2000 Negotiations, March 2001, para. 14. Article XIX of GATS in fact mandates the Council for Trade in Services to carry out an assessment of trade in services with reference to the objectives of GATS. The question arises as to the extent to which social and environmental concerns, or human rights could implicitly be read into those objectives, if at all.

[73] Declaration on the Right to Development, article 2 (3).